

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

THE METROPOLITAN MUSEUM OF ART

EMPLOYER

and

CASE NO: 2-RC-22979

LOCAL 338, RWDSU/UFCW, AFL-CIO

PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a duly designated Hearing Officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding¹, it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that The Metropolitan Museum of Art, the Employer, a not-for-profit corporation with its primary place of business located at 1000 Fifth Avenue, New York, New York, is engaged in the operation of an art museum. Annually, in the course and conduct of its business operations, the

Employer derives gross revenues in excess of \$1,000,000, and purchases and receives goods and materials at its facility in excess of \$50,000 directly from suppliers located outside the State of New York.

Based on the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find that Local 338, RWDSU/UFCW, AFL-CIO, herein the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) of the Act.

5. Petitioner amended its petition at the hearing and is seeking an election in a unit of all full-time and regular part-time retail sales employees employed by the Employer in its facility located at 1000 Fifth Avenue, New York, New York 10028, including store sales people, senior store sales people, store reps, senior store reps, senior store stock persons, store stock persons and group leaders, but excluding managers, coordinators, and guards, and supervisors, as defined by the Act.

The Employer contends that the petitioned-for unit, limited to the shops in the Fifth Avenue facility, is inappropriate for collective bargaining and that the smallest unit should include all of the Fifth Avenue facility shops and the 9 satellite shops located within the tri-state area. During the hearing, the parties

¹ Briefs were filed by the Employer and Petitioner and were duly considered.

agreed to the unit inclusions as petitioned for in the amended petition, with the status of the cash control supervisor and the stylists being left unresolved. Thus the cash control supervisors and the stylists will be permitted to vote subject to challenge. Having resolved all unit eligibility issues, unit scope is the sole remaining issue to be determined herein.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer is one of the world's most prestigious art museums. The record fails to reflect any specific information about the layout of the Employer's main facility. However, official notice is taken that the Employer's main building, located at 1000 Fifth Avenue in Manhattan, herein called the Fifth Avenue facility, spans several blocks on Fifth Avenue and has entrances at 81st Street and 82nd Street. The Fifth Avenue facility is comprised of three levels consisting of numerous exhibition galleries, with a total floor space of approximately 2 million square feet. The Fifth Avenue facility houses over 2 million works of art and, together with the Cloisters, its other site located in Ft. Tryon Park in Manhattan, has attracted approximately 5 million visitors each year for the past several years. While New York City owns the Fifth Avenue building, the Employer, a nonprofit corporation, is governed by a board which holds the art works in trust.

THE RETAIL OPERATION

In addition to managing an art museum, the Employer's also has a retail component, under the supervision of Sally Pearson, the Vice President and General Manager of Merchandising and Retail. Ms. Pearson is responsible for the operation of all of the retail shops located at the Fifth Avenue facility, as well

as all other satellite stores. Ms. Pearson's office is located at 6 E. 82nd Street which is across the street from the Fifth Avenue facility. Will Sullivan, who reports directly to Ms. Pearson, has direct managerial responsibility for the Fifth Avenue facility stores. These shops house the unit employees sought by Petitioner. David Hopkins, the National Manager of Satellite Shops, Merchandising and Store Planning, also reports directly to Ms. Pearson, and has managerial responsibility for the 19 satellite shops², including the 9 stores that are located within the tri-state area³.

Each of the 19 satellite shops in the United States has a store manager. In addition to the manager, certain satellite locations also have assistant managers, coordinators and group leaders in addition to the sales employees. The shops that are located in the Fifth Avenue facility are the main book shop, the color print shop, the North Shop, Gift Shop South, the Mezzanine Gallery and the remote sales and special exhibitions. While Mr. Hopkins was unable to give any specific testimony regarding the organizational structure of the shops located within the Fifth Avenue facility, it appears that each of these shops also has a manager and possibly a coordinator and assistant coordinator. The Employer also employs a manager of store planning who is housed in the main facility and who has responsibility for store planning for both the Fifth Avenue shops and the satellite shops. The store planning manager is responsible for overseeing and coordinating the work of architects and contractors during any renovations or

² The record is silent as the management of the 11 International locations operated by the Employer.

installations, such as a new jewelry counter. David Hopkins also testified that the Employer seeks to present a unified look at all of its shops regardless of the location. In order to accomplish this goal, the Employer employs stylists in an effort to have the same displays in all shops. The record further establishes that certain of the satellite shops, which are smaller in size, carry less stock with fewer product choices.

The record is silent as to any separate organizational structure or division that is identified as the "Tri-State area". While David Hopkins exercises managerial and administrative control over the nine satellite stores in New York and New Jersey (there is no longer a Connecticut satellite store), he also oversees all 19 satellite stores located throughout the United States. There is no record testimony about the International satellite stores or who else, if not David Hopkins, oversees them. The record is silent with regard to the distances between the shops in the tri-state area and the Fifth Avenue facility. However, in its brief, the Employer contends that all of the satellite shops are within a 25 mile radius of the Fifth Avenue facility. I will take official notice that the shops at JFK airport, Newark Airport, Short Hills Mall and White Plains are at a substantial distance from the Fifth Avenue facility ranging from 15 to 27 miles from the Fifth Avenue facility.

The Employer has a central human resources department which sets the salary and level benefits for all the Employer's employees, including those working in the retail operation of the Employer and conducts job fairs and

³ The shop in Stamford, Connecticut is no longer in operation leaving only the shops in New York and two satellite shops in New Jersey within the tri-state area of New York,

processes all job applications for the shops. The wage and benefit package is uniformly set for all employees regardless of whether they work in the Fifth Avenue facility or in a satellite facility.

The store managers have a significant degree of control over the employees in their shops. The manager can issue disciplinary warnings to employees. With regard to suspensions or discharges, David Hopkins testified that he would expect a manager to first send a suspension or discharge through him or his assistant, Jessica Albright, after which he would send it to the human resource department. Hopkins conceded that he was not as familiar with the operation of the shops located in the Fifth Avenue facility. Kathryn Wiebusch, presently the manager of the Book Shop located in the Fifth Avenue facility, testified that when she was initially hired by the Employer, she worked as a group leader. At that time, only the manager, John Dean, had the authority to discipline employees. She also testified that when she became a manager, only she has had the authority to discharge employees for misconduct. Ms. Wiebusch gave an example of her authority in this regard. She discharged an employee who had many difficulties in handling his cash register duties and she testified that she discharged the employee. It thus appears that the shop managers have significant authority over hiring and discharging employees. Further, managers receive information from coordinators and group leaders and then investigate the incident by conducting an investigatory meeting. When Ms. Wiebusch conducts an investigative meeting, the coordinator or group leader would attend only as a witness. Ms. Weibusch testified that as a manager she has received training from

the human resources department in the ways to handle discipline and she has adopted a method most suitable to her personality. Thus the manager also has significant authority with respect to hiring and either makes decisions to hire personally or in some situations consults with the human resources department. The manager can also investigate cash register discrepancies and decide which employees receive wage increases.

With respect to interchange, the record indicates that upon the closing of shops, such as the Prince Street shop which lost its lease recently, sales employees who were losing their jobs were informed that they should apply for jobs at the Fifth Avenue facility. Jobs were not guaranteed the laid off employees according to Hopkins because there were more employees being laid off than there were available positions. The Employer's human resources department posts all job openings at any location by faxing the opening to all of its retail facilities. The record indicates that 17 employees transferred from the main building to a satellite shop or from a satellite shop to the main building, although the time period during which they occurred was not described. Hopkins also testified that the smaller satellite shops with limited staffing have at times requested volunteers to work during vacations or other leaves of the regularly assigned staff at that location. Again the record provides no details as to when this has occurred or how frequently this occurs.

ANALYSIS

The Act does not require that a unit for bargaining be the only appropriate unit, the ultimate unit, or the most appropriate unit. Rather the Act requires only that the unit be an appropriate unit for the purposes of collective bargaining. The Board has held that in determining whether a petitioned-for unit is appropriate, the unit sought by the petitioning union is always a relevant consideration. *Lundy Packing Co.*, 314 NLRB 1042 (1994). In this case, the issue to be decided is whether the petitioned-for unit which consists of all sales employees employed in the several shops in the Fifth Avenue facility is an appropriate unit. The record clearly establishes that each of the Fifth Avenue facility shops is managed by a manager, just like the 19 satellite shops. Thus the issue before me is whether the grouping of shops in the Fifth Avenue facility, a separate defined geographical area, is an appropriate unit or whether, as proposed by the Employer, the geographical grouping must include the satellite shops in New York City, New York State and New Jersey .

Single-Facility Issue

In determining an appropriate unit where there are multiple shops in a closely defined area, the Board considers the community of interests among the employees working at the different locations, including: (1) similarity in employee skills, duties and working conditions; (2) functional integration of the business, including employee interchange; (3) centralized control of management and supervision; (4) geographical separation of facilities; (5) collective-bargaining history and extent of union organization; and (6) employee choice. *Metropolitan Life Insurance Co.*, 156 NLRB 1408 (1966). The Board has also found that an

Employer's administrative grouping is not dispositive in determining the appropriate unit. *Sav-On Drugs, Inc.*, 138 NLRB 1032 (1962).

The Petitioner contends that the shops within the Fifth Avenue facility constitute a single-plant unit. As a general rule, a single-plant unit is presumptively appropriate, unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated that it has lost its separate identity. *Cargel, Inc.*, 336 NLRB 1114 (2001); *J&L Plate, Inc.*, 310 NLRB 429 (1993). To determine whether the presumption has been rebutted, the Board considers such factors as: centralized control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; geographic proximity; and bargaining history, if any. *New Britain Transportation Co.*, 330 NLRB 397 (1999). Furthermore, "the party seeking to overcome the single-site presumption must show that the day-to-day interests of the employees at the sought locations have merged with those employees of the other locations." *Renzetti's Market, Inc.*, 238 NLRB 174, 175 (1978). The facts of this case suggest, however, that the unit sought by the Petitioner is more akin to a geographical grouping of shops all located within a large three-story facility which has been called the Fifth Avenue facility. I find that whether the shops at the Fifth Avenue facility are a single-plant or a separate and distinct geographic grouping, the Employer has not established that the petitioned-for unit is inappropriate for collective bargaining.

The record here reveals that the Employer's business operations include retail shops both at the Fifth Avenue facility and throughout the United States.

Every shop, including the shops located throughout the Fifth Avenue facility has a manager. Each manager exerts significant control over the employees at his or her shop, including the authority to hire employees with only administrative assistance from the human resources department. Further, the record establishes that a manager can issue disciplinary warnings without consulting with higher management. Although David Hopkins testified that he would expect a manager to first send a suspension or discharge through him or his assistant, Jessica Albright, after which he would send it to the human resource department, he admitted that he was not as familiar with the operation of the shops located in the Fifth Avenue facility. Kathryn Wiebusch, the manager of the Book Shop located in the Fifth Avenue facility, testified that when she was first hired and was working as a group leader, only the manager, John Dean, had the authority to discipline employees. She also testified that now she is a manager, she is the sole person with authority to discharge employees for misconduct. Further, managers are informed of employee misconduct by their coordinators or group leaders, after which the manager investigates the incident and conducts an investigatory meeting. Ms. Weibusch received training from the human resources department in the ways to handle discipline and adopted a method most suitable to her without any apparent interference from the Human resources people. Thus the record establishes that the managers are vested with significant managerial authority in overseeing their shop. Even assuming that for the Fifth Avenue facility shops, Sullivan operates in the same manner as Hopkins who handles the more serious disciplinary cases, the Board has held that the issuance of verbal

warnings by local managers is sufficient to establish local autonomy. See *Carter Hawley Hale Stores*, 273 NLRB 621 (1984); *Renzetti's Market, Inc.*, 238 NLRB *supra* (1978) and *Buehler's Food Markets, Inc.*, 232 NLRB 785 (1977).

The Employer also relies on the centralization of personnel policies, such as the company-wide posting of job openings, and labor costs on the company-wide basis in seeking to overcome the geographic presumption of the petitioned-for unit. However, the Board has consistently held that commonly administered labor policies alone are not sufficient to overcome the presumption that a geographically defined unit is itself appropriate for bargaining. See *New Britain Transportation*, 330 NLRB, 397, 398 (1999); and *Rental Uniform Services*, 330 NLRB 334 (1999).

The Employer also contends that there is evidence of frequent transfers among the shops and significant interaction between shop employees sufficient to overcome the local autonomy of the shops. The record does not support this contention. There are very limited examples of permanent transfers among the stores and the examples provided were unsupported by any specific details surrounding these actions. It does appear that the 17 examples of transfers provided on the record were all permanent transfers although when they occurred was not provided. There was mention of some temporary transfers to fill in for a vacationing employee at a smaller shop, but these were filled when the Employer put out a call to see if any employee would voluntarily cover the assignment for a day. The Board has held that permanent transfers are entitled

to less weight than temporary transfers in determining unit scope. *General Mills Restaurants, Inc., d/b/a Red Lobster*, 300 NLRB 908, 911 (1990) .

The Board considers “most relevant” the extent of autonomous supervision at the petitioned-for store. In other words:

whether or not the employees at the sought store perform their day-to-day work under the immediate supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems.

Renzetti's Markets, 238 NLRB at 175. See *New Britain Transportation*, *supra* at 397 (“[c]entralized control over personnel and labor relations alone . . . is not sufficient to rebut the single-location presumption where the evidence demonstrates significant local autonomy over labor relations.”) In this regard, as noted above, the Employer vests shop-level management with significant supervisory autonomy. See *Penn Color, Inc.*, 249 NLRB 1117, 1119 (1980) where the manager’s significant involvement in hiring process supported single-unit finding even though the ultimate authority in these matters rested with upper management; and *Renzetti's Market*, *supra* at 175 which found a single unit where store manager, among other things, “participates in the interviewing process”.

The Employer’s effort to overcome the presumption that the separate geographical grouping of shops in the Fifth Avenue facility can not be sustained.

It is noted that the contention that these stores must be grouped with the other “tri-state” stores is equally unsupported; particularly where the record fails to establish that there is a tri-state area district. David Hopkins is the overall manager of all satellite shops and the record fails to support the tri-state area as a distinct and separate district or division which militates toward the inclusion of the shops at the Fifth Avenue facility.

The facts in this matter differ significantly from the cases cited by the Employer in support of its position. In *R&D Trucking*, 327 NLRB 531 (1999) relied upon by the Employer, wherein the Board found a sufficient basis to rebut the single-facility presumption, the Board found it to be significant that the employer did not assign a manager to the employees sought by the union.

Based on the foregoing, I cannot conclude, as the Employer asserts, that the petitioned-for grouping of all shops located within the Employer’s Fifth Avenue facility is not an appropriate unit for the purposes of collective bargaining, and I find that the Employer has not established that its proposed unit is the only appropriate unit .

In view of the foregoing, I find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

INCLUDED: all full-time and regular part-time retail sales employees employed by the Employer in its facility located at 1000 Fifth Avenue, New York, New York 10028, including store sales people, senior store sales people, store reps, senior store reps, senior store stock persons, store stock persons and group leaders.

EXCLUDED: all other employees, and guards, professional employees, and managers, coordinators and other supervisors as defined in the Act.

NOTE: All cash control supervisors and the stylists will be permitted to vote subject to challenge.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time⁴ and place set forth in the notice of election⁵ to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed at the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such a strike, who have retained their status as strikers but have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the

⁴ Pursuant to Section 101.21 (d) of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this decision.

⁵ The Board has adopted a rule requiring that election notices be posted by an employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, the Board has held that Section 103.20 (c) of the Board's Rules requires that an employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB No. 52 (1995).

commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁶ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local 338, RWDSU/UFCW, AFL-CIO.⁷

Dated at New York, New York,
June 10, 2005

/s/ _____
Celeste J. Mattina,
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

⁶ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **June 17, 2005**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁷ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **June 24, 2005**.